1950

*June 13, 15, 16

*Nov 20

ANNIE MAUD NOBLE (Vendor) and BERNARD WOLF (Purchaser) .... } APPELLANTS;

AND

W. A. ALLEY, *et al*.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real Property—Restrictive Covenant—Covenant not to sell land to persons of Jewish or Negro race—Validity—Certainty.

A restrictive covenant in a deed drawn in 1933 provided that the lands therein described should never be sold to any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood and that the restriction should remain in force until August 1, 1962.

A motion made in the Supreme Court of Ontario for an order declaring the covenant invalid was dismissed, the Court holding the covenant valid and enforceable. The decision was affirmed by the Court of Appeal.

Held: (Locke J. dissenting), that the appeal should be allowed.

Per Kerwin, Taschereau, Rand, Kellock and Fauteux JJ.—The covenant has no reference to the use or abstention from use of the land.

Per Kerwin and Taschereau JJ.—It would be an unwarrantable extension of the doctrine expounded in *Tulk* v. *Moxhay*, 2 Phil. 774; 41 E.R. 1143, or in subsequent cases, to say that it did.

Per Rand, Kellock and Fauteux JJ.—By its language the covenant is not directed to the land or some mode of its use but to transfer by act of the purchaser and on its own terms it fails in annexation to the land. On its true terms it is a restraint on alienation.

*PRESENT: Kerwin, Taschereau, Rand, Kellock, Estey, Locke and Fauteux JJ.

Per Rand, Kellock, Estey and Fauteux JJ.—The covenant is void for uncertainty; from its language it is impossible to set such limits to the lines of race or blood as would enable a court to say in all cases whether a proposed purchaser is or is not within the ban. *Clavering* v. *Ellison* 11 E.R. 282 at 289; *Clayton* v. *Ramdsen,* [1943] A.C. 320.

Locke J., dissenting, would have dismissed the appeal on the ground that the application of the equitable principle in *Tulk* v. *Moxhay* (1848) 2 Phil. 774, not having been raised before Schroeder J., and the Court of Appeal having in the exercise of its discretion declined to consider the point on that ground, this Court should not interfere in a matter that was one of practice in the Ontario courts. As to the remaining points of law he agreed with the reasons of the Chief Justice of Ontario.

APPEAL from the judgment of the Court of Appeal for Ontario, (1), affirming the judgment of Schroeder J., (2), on a motion under s. 3 of *The Vendors and Purchasers Act,* R.S.O., 1937, c. 168.

J. J. Robinette K.C. and *W. B. Williston* for the appellant Noble.

J. Shirley Dennison K.C. and *Norman Borins K.C.* for the appellant Wolf.

K. G. Morden K.C. and *J. C. Osborne* for the respondents.

The judgment of Kerwin and Taschereau JJ. was delivered by:

KERWIN J.: This is an appeal against a judgment of the Court of Appeal for Ontario (1) affirming the judgment of Schroeder J. (2) on a motion under s. 3 of *The Vendors and Purchasers Act,* R.S.O. 1937, c. 168. That section, so far as relevant, provides that a vendor of real estate may apply in a summary way to the Supreme Court in respect of any requisition or objection arising out of, or connected with, a contract for the sale or purchase of land. The motion was made by the present appellant, Mrs. Noble, as the vendor under a contract for the sale by her to the purchaser, her co-appellant Bernard Wolf, of land forming part of a summer resort development known as the Beach O'Pines.

(1) [1949] O.R. 503.
(2) [1948] O.R. 579.

(1) [1949] O.R. 503.
(2) [1948] O.R. 579.

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Kerwin J.

This land had been purchased in 1933 by Mrs. Noble from the Frank S. Salter Company, Limited, and in the deed from it to her appeared the following covenant:

> And the Grantee for himself his heirs, executors, administrators and assigns, covenants and agrees with the Grantor that he will carry out, comply with and observe, with the intent that they shall run with the lands and shall be binding upon himself, his heirs, executors, administrators and assigns, and shall be for the benefit of and enforcible by the Grantor and/or any other person or persons seized or possessed of any part or parts of the lands included in Beach O'Pines Development, the restrictions herein following, which said restrictions shall remain in full force and effect until the first day of August, 1962, and the Grantee for himself, his heirs, executors, administrators and assigns further covenants and agrees with the Grantor that he will exact the same covenants with respect to the said restrictions from any and all persons to whom he may in any manner whatsoever dispose of the said lands.
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> * * *
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> (*f*) The lands and premises herein described shall never be sold, assigned, transferred, leased, rented or in any manner whatsoever alienated to, and shall never be occupied or used in any manner whatsoever by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, it being the intention and purpose of the Grantor, to restrict the ownership, use, occupation and enjoyment of the said recreational development, including the lands and premises herein described, to persons of the white or Caucasian race not excluded by this clause.

Although the deed was not signed by Mrs. Noble, I assume that she is bound to the same extent as if she had executed it.

Each conveyance by the Company to a purchaser of land in the development contained a covenant in the same form. The present respondents, being owners of other parcels of land in the development, were served with notice of the application either before Schroeder J. or the Court of Appeal, and they and their counsel affirmed the validity of the covenant, its binding effect upon Mrs. Noble, and that any of the respondents are able to take advantage of the covenant so as to prevent by injunction its breach. While before the judge of first instance the vendor and purchaser apparently took opposite sides, each of them appealed to the Court of Appeal and, there, as well as before this Court, attacked the contentions put forward on behalf of the respondents.

In the Courts below emphasis was laid upon the decision of Mackay J. in *Re Drummond Wren* (1), and it was considered that the motion was confined to the consideration

(1) [1945] O.R. 778.

of whether that case, if rightly decided, covered the situation. The motion was for an order declaring that the objection to the covenant made on behalf of the purchaser had been fully answered by the vendor and that the same did not constitute a valid objection to the title or for such further and other order as might seem just. The objection was:

> REQUIRED in view of the fact that the purchaser herein might be considered as being of the Jewish race or blood, we require a release from the restrictions imposed in the said clause (*f*) and an order declaring that the restrictive covenant set out in the said clause (*f*) is void and of no effect.

The answer by the vendor was that the decision in *Re Drummond Wren* applied to the facts of the present sale with the result that clause (f) was invalid and the vendor and purchaser were not bound to observe it. In view of the wide terms of the notice of motion, the application is not restricted and it may be determined by a point taken before the Court of Appeal and this Court, if not before Mr. Justice Schroeder.

That point depends upon the meaning of the rule laid down in *Tulk* v. *Moxhay* (1). This was a decision of the Lord Chancellor, Lord Cottenham, affirming a decision of the Master of the Rolls. The judgment of the Master of the Rolls appears in 18 L.J.N.S. (Equity) 83, and the judgment of the Lord Chancellor is more fully reported there than in Phillips' Reports. In the latter, the Lord Chancellor is reported as saying, page 777:

> That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed.

In the Law Journal, the following appears at p. 87:

> I have no doubt whatever upon the subject; in short, I cannot have a doubt upon it, without impeaching what I have considered as the settled rule of this Court ever since I have known it. That this Court has authority to enforce a contract, which the owner of one piece of land may have entered into with his neighbour, founded, of course, upon good consideration, and valuable consideration, that he will either use or abstain from using his land in any manner that the other party by the contract stipulates shall be followed by the party who enters into the covenant, appears to me the very foundation of the whole of this jurisdiction. It has never, that I know of, been disputed.

(1) (1848) 2 Phil. 774; 41 E.R. 1143.

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At p. 88 of the Law Journal, the Lord Chancellor states that the jurisdiction of the Court was not fettered by the question whether the covenant ran with the land or not but that the question was whether a party taking property, the vendor having stipulated in a manner, binding by the law and principles of the Court of Chancery to use it in a particular way will not be permitted to use it in a way diametrically opposite to that which the party has covenanted for. To the same effect is p. 778 of Phillips's.

In view of these statements I am unable to gain any elucidation of the extent of the equitable doctrine from decisions at law such as *Congleton* v. *Pattison* (1) and *Rogers* v. *Hosegood* (2). It is true that in the Court of Appeal, at p. 403, Collins L.J., after referring to extracts from the judgment of Sir George Jessel in *London & South Western Ry. Co.* v. *Gomm* (3), said at p. 405:

> These observations, which are just as applicable to the benefit reserved as to the burden imposed, shew that in equity, just as at law, the first point to be determined is whether the covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees; if it does not, it is incapable of passing by mere assignment of the land.

This, however, leaves untouched the problem as to when a covenant binds the land.

Whatever the precise delimitation in the rule in *Tulk* v. *Moxhay* may be, counsel were unable to refer us to any case where it was applied to a covenant restricting the alienation of land to persons other than those of a certain race. Mr. Denison did refer to three decisions in Ontario: *Essex Real Estate* v. *Holmes* (1); *Re Bryers and Morris* (2); *Re McDougall* v. *Waddell* (3); but he was quite correct in stating that they were of no assistance. The holding in the first was merely that the purchaser of the land there in question did not fall within a certain prohibition. In the second an inquiry was directed, without more. In the third, all that was decided was that the provisions of s. 1 of *The Racial Discrimination Act,* 1944, (*Ontario*), c. 51 would not be violated by a deed containing a covenant on the part of the purchaser that certain lands or any buildings erected thereon should not at any time

(1) (1808) 10 East 130.
(2) [1900] 2 Ch. 388.
(3) (1882) 20 Ch. D. 562.
(1) (1930) 37 O.W.N. 392.
(2) (1931) 40 O.W.N. 572.
(3) [1945] O.W.N. 272.

be sold to, let to or occupied by any person or persons other than Gentiles (non-semitic (sic)) of European or British or Irish or Scottish racial origin.

It was a forward step that the rigour of the common law should be softened by the doctrine expounded in *Tulk* v. *Moxhay* but it would be an unwarrantable extension of that doctrine to hold, from anything that was said in that case or in subsequent cases that the covenant here in question has any reference to the use, or abstension from use, of land. Even if decisions upon the common law could be prayed in aid, there are none that go to the extent claimed in the present case.

The appeal should be allowed with costs here and in the Court of Appeal. There should be no costs of the original motions in the Supreme Court of Ontario.

The judgment of Rand, Kellock and Fauteux JJ. was delivered by:

RAND J.:—Covenants enforceable under the rule of *Tulk* v. *Moxhay* (1), are properly conceived as running with the land in equity and, by reason of their enforceability, as constituting an equitable servitude or burden on the servient land. The essence of such an incident is that it should touch or concern the land as contradistinguished from a collateral effect. In that sense, it is a relation between parcels, annexed to them and, subject to the equitable rule of notice, passing with them both as to benefit and burden in transmissions by operation of law as well as by act of the parties.

But by its language, the covenant here is directed not to the land or to some mode of its use, but to transfer by act of the purchaser; its scope does not purport to extend to a transmission by law to a person within the banned class. If, for instance, the grantee married a member of that class, it is not suggested that the ordinary inheritance by a child of the union would be affected. Not only, then, it is not a covenant touching or concerning the land, but by its own terms it fails in annexation to the land. The respondent owners are, therefore, without any right against the proposed vendor.

(1) (1848) 11 Beav. 571; 50 E.R. 937.

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Rand J.

On its true interpretation, the covenant is a restraint on alienation. The grantor company which has disposed of all its holdings in the sub-division has admittedly ceased to carry on business and by force of the provisions of *The Companies' Act,* R.S.O. 1937, c. 251, s. 28 its powers have become forfeited; but by ss. (4) they may, on such conditions as may be exacted, be revived by the Lieutenant-Governor in Council. Assuming the grantor would otherwise be entitled to enforce the covenant in equity against the original covenantor—and if he would not the point falls—it becomes necessary to deal with the question whether for the purposes of specific performance the covenant is unenforceable for uncertainty.

It is in these words: (See clause (*f*) p—?

> The lands and premises herein described shall never be sold, assigned, transferred, leased, rented or in any manner whatsoever alienated to, and shall never be occupied or used in any manner whatsoever by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, it being the intention and purpose of the Grantor, to restrict the ownership, use, occupation and enjoyment of the said recreational development, including the lands and premises herein described, to persons of white or Caucasian race not excluded by this clause.

If this language were in the form of a condition, the holding in *Clayton* v. *Ramsden* (1), would be conclusive against its sufficiency. In that case the House of Lords dealt with a condition in a devise by which the donee became divested if she should marry a person "not of Jewish parentage and of the Jewish faith" and held it void for uncertainty. I am unable to distinguish the defect in that language from what we have here: it is impossible to set such limits to the lines of race or blood as would enable a court to say in all cases whether a proposed purchaser is or is not within the ban. As put by Lord Cranworth in *Clavering* v. *Ellison* (1), at p. 289 the condition "must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding estate was to determine."

The effect of the covenant, if enforceable, would be to annex a partial inalienability as an equitable incident of the ownership, to nullify an area of proprietary powers.

(1) [1943] A.C. 320.

(1) (1859) 7 H.L.C. 707; 11 E.R. 282.

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Estey J.

In both cases there is the removal of part of the power to alienate; and I can see no ground of distinction between the certainty required in the one case and that of the other. The uncertainty is, then, fatal to the validity of the covenant before us as a defect of or objection to the title.

I would, therefore, allow the appeal and direct judgment to the effect that the covenant is not an objection to the title of the proposed vendor, with costs to the appellants in this Court and in the Court of Appeal.

ESTEY J.:—The appellants Noble as vendor and Wolf as purchaser were negotiating relative to a summer residence in an area known as the Beach O'Pines on Lake Huron. In the course thereof questions were raised as to the validity of clause (*f*) (hereinafter quoted) in the agreement under which the appellant Noble acquired the premises on the 16th of January, 1933, from the Frank S. Salter Company Limited. The appellant Noble, therefore, brought a motion under the *Vendors and Purchasers Act* (R.S.O. 1937 c. 168) for an order, *inter alia*, that the restrictive covenant (clause (*f*)) did not constitute a valid objection to the title. Mr. Justice Schroeder held the covenant to be valid and his judgment was affirmed by the Court of Appeal for Ontario.

The appellants contend this clause (*f*) is contrary to public policy, constitutes a restraint upon alienation and is void for uncertainty.

Clause (*f*) is a subparagraph in the following clause:

> And the Grantee for himself, his heirs, executors, administrators and assigns, covenants and agrees with the Grantor that he will carry out, comply with and observe, with the intent that they shall run with the lands and shall be binding upon himself, his heirs, executors, administrators and assigns, and shall be for the benefit of and enforceable by the Grantor and/or any other person or persons seized or possessed of any part or parts of the lands included in Beach O'Pines Development, the restrictions herein following, which said restrictions shall remain in full force and effect until the first day of August, 1962, and the Grantee for himself, his heirs, executors, administrators and assigns further covenants and agrees with the Grantor that he will exact the same covenants with respect to the said restrictions from any and all persons to whom he may in any manner whatsoever dispose of the said lands.
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> (*f*) The lands and premises herein described shall never be sold, assigned, transferred, leased, rented or in any manner whatsoever alienated to, and shall never be occupied or used in any manner whatsoever by any

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person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, it being the intention and purpose of the Grantor, to restrict the ownership, use, occupation and enjoyment of the said recreational development, including the lands and premises herein described, to persons of the white or Caucasian race not excluded by this clause.

This restrictive covenant literally construed would prohibit any person possessing the slightest degree of race or blood specified purchasing any land in this area. So construed it would be necessary to determine whether it constituted such a substantial restraint upon alienation as to make the clause void "as being repugnant to the very conception of ownership." Cheshire's *Modern Real Property*, 5th Ed. p. 528.

It is, however, submitted that the parties never intended that the language should be so strictly construed. Once, however, another or more liberal construction be given the issue becomes one of what degree of race or blood would be permitted. As to what degree the contract is silent. A judge, therefore, called upon to determine this issue, finds in the contract no standard or other assistance that would constitute a basis upon which the issue might be determined. His position would be analogous to that of the Earl of Halsbury in *Murray* v. *Dunn* (1), where he stated:

> I confess I have been looking in vain for some definite guide as to what is suggested to be the real meaning. Both the learned counsel who have addressed your Lordships have, I think, failed to give any definite meaning to the words.

In *Sifton* v. *Sifton* (2), the testator provided for certain payments to be made to his daughter subject to a condition subsequent that "the payments to my said daughter shall be made only so long as she shall continue to reside in Canada." This was held to be void for uncertainty. It was agreed that the testator did not intend that his daughter should remain absolutely in Canada, but for what period and for what purpose she might remain outside of Canada could not be ascertained from the terms of the will.

In *Clayton* v. *Ramsden* (1), the testator bequeathed a pecuniary legacy and a share of the residue upon trust for his daughter subject to a condition subsequent that if his

(1) [1907] A.C. 283 at 290.
(2) [1938] 656.
(1) [1943] A.C. 320.

daughter "shall at any time after my death contract a marriage with a person who is not of Jewish parentage and of the Jewish faith then * * * all the * * * provisions * * * shall cease and determine * * *" Lord Romer, with whom Lord Atkin and Lord Thankerton agreed, was of the opinion that "Jewish parentage," as used in this will, meant of the Jewish race and that the condition subsequent was void for uncertainty. At p. 333 he stated:

> It seems far more probable that the testator meant no more than that the husband should be of Hebraic blood. But what degree of Hebraic blood would a permissible husband have to possess? Would it be sufficient if one only of his parents were of Hebraic blood? If not, would it be sufficient if both were? If not, would it be sufficient if, in addition, it were shown that one grandparent was of Hebraic blood or must it be shown that this was true of all his grandparents? Or must the husband trace his Hebraic blood still further back? These are questions to which no answer has been furnished by the testator. It was, therefore, impossible for the court to see from the beginning precisely or distinctly on the happening of what event it was that Mrs. Clayton's vested interests under the will were to determine, and the condition is void for uncertainty.

Lord Romer's decision is based upon *Clavering* v. *Ellison* (1), where at 725 Lord Cranworth stated:

> that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.

The foregoing are cases of conditions subsequent providing for the divesting of vested estates. It is contended that such precise and distinct language is not required in restrictive covenants. On the contrary, both upon principle and authority, the same clarity would appear to be essential.

Restrictive covenants constitute "an equity attached to land by the owner," Lord Cottenham in *Tulk* v. *Moxhay* (2); and in *Hall* v. *Ewin* (3), Lord Lindley states: "The principle of *Tulk* v. *Moxhay* * * * imposes a burden on the land * * *" This burden passes with the land against all but purchasers without notice thereof and parties interested are entitled to ascertain from the covenant the exact nature, character and extent of the restriction.

(1) (1859) 7 H.L. 707; 11 E.R. 282.
(2) (1848) 2 Phil. 774 at 779.
(3) (1887) 37 Ch. D. 74 at 81.

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Moreover, these covenants constituting a burden upon the land must, in general, interfere with the right of disposition thereof. Lord Dunedin, in speaking of a condition restricting land, and the same rule of construction would apply to a covenant, stated, in *Anderson* v. *Dickie* (1) at 227:

> Far earlier than this it had been held that all conditions restricting the use of land must be very clearly expressed, the presumption being always for freedom;

In *Murray* v. *Dunn* (2), a covenant, by way of a servitude, provided that "any building of an unseemly description" should not be erected upon the premises. Lord Kinnear in the First Division of the Court of Session for Scotland delivered a judgment which was approved of in the House of Lords. In the course of his judgment he stated that the bond of servitude "provides no standard for the specific application of the terms * * *" and at 287:

> So far as my opinion goes, I cannot say that it is unseemly; the utmost that can be said for the pursuers' case is that that is a matter of opinion, and if there may be a reasonable difference of opinion as to the specific application of the terms in which a servitude is expressed to the facts of a particular case, it is not a well-defined servitude.

In Brown—*Covenants Running with Land,* at p. 126, the author states:

> A restrictive covenant as to letting or user of property will be construed strictly; the Court will not extend it on the ground of presumed intention.

See also Jolly—*Restrictive Covenants Affecting Land,* at p. 77 and p. 79.

These authorities support the view that the language of a restrictive covenant must set forth clearly and distinctly the intent of the parties. The general language in clause (*f*), with great respect to those learned judges who hold a contrary view, fails to indicate the intention of the parties as to the amount or degree of the prohibited race or blood that might be permitted. It must, therefore, upon the authorities, be held void for uncertainty.

The appeal should be allowed with costs here and in the Court of Appeal. There should be no costs of original motion in the Supreme Court of Ontario.

(1) (1915) 84 L.J.P.C. 219. (2) [1907] A.C. 283.

LOCKE J. (dissenting):—The proceedings in this matter were initiated by an application made by the appellant Noble to the Supreme Court of Ontario under the provisions of *The Vendors and Purchasers Act* (R.S.O. 1937, c. 168) and *The Conveyancing and Law of Property Act* (R.S.O. 1937, c. 152) in the following circumstances. By deed dated January 10th. 1933, the Frank S. Salter Company Limited granted to the said appellant a plot of land situate in a summer resort known as Beach O'Pines in the Township of Bosanquet on the shores of Lake Huron, together with a right-of-way over certain lands described in a deed of land from that company to Beach O'Pines Club Limited, for the purpose of ingress and egress from and to the public highway and the water's edge of Lake Huron. By the conveyance it was recited, *inter alia,* that the grantee covenanted for herself, her heirs, executors, administrators and assigns to carry out, comply with and observe, with the intent that they should run with the lands and be binding upon her and upon them and be for the benefit of and enforcible by the grantor and any other persons seized or possessed of lands included in the Beach O'Pines Development, the restrictions thereafter recited which were to remain in force until August 1, 1962, and that she would exact the same covenants with respect to the said restrictions from any person to whom she might dispose of the lands of the various restrictions thereafter recited. The only one with which we are concerned is in a clause lettered (*f*) and provided that the lands should never be sold, rented or in any manner alienated to and never be occupied or used in any manner by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, it being the declared intention and purpose of the grantor to restrict the ownership, use, occupation and enjoyment of the said recreational development, including the described lands, to persons of the white or Caucasian race. While Mrs. Noble apparently did not execute the conveyance she took possession under it and it is not contended on her behalf that if otherwise enforcible against her she is not bound by its terms.

By an offer to purchase dated April 19, 1948, the appellant Bernard Wolf offered to purchase the property from

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Locke J.

Mrs. Noble and while the fact was not proven it is apparently common ground that this offer was accepted in writing. The proposal stipulated that Wolf should be allowed twenty days from the date of its acceptance to investigate the title and if within that time he should present any valid objection to the title which the vendor should be unwilling or unable to remove, the agreement should terminate. Thereafter, by letter dated the 5th day of May, 1948, the solicitor for Wolf submitted the following requisitions to the solicitor for Mrs. Noble:

> Required in view of the fact that the purchaser herein might be considered as being of the Jewish race or blood, we require a release from the restrictions imposed in the said clause (*f*) and an order declaring that the restrictive covenant set out in the said clause (*f*) is void and of no effect.

Mrs. Noble's solicitor replied to that requisition by a letter dated May 6, 1948, stating:

> In our opinion the decision rendered in the case of *re Drummond Wren*, 1945 Ontario Reports p. 778 applies to the facts of the present sale, with the result that the clause (*f*) objected to is invalid and the vendor and purchaser are not bound to observe it.

In a letter written on the same date the purchaser replied insisting upon an order of the court being obtained in which it would be declared that the said restrictive covenant was "void and of no effect." These proceedings were then initiated by a notice of motion given on behalf of Mrs. Noble:

> for an order declaring that the objection to the restrictive covenant made in writing on behalf of the purchaser dated the 5th day of May, 1948, has been fully answered by the vendor and that the same does not constitute a valid objection to the title.

In view of the subsequent course of these proceedings it is of importance to consider the nature of the material filed on the application and the identity of the persons who were notified of the proceedings and took part in the argument. In support of the motion there was filed an affidavit of one of the solicitors for Mrs. Noble reciting the purchase of the property by her, the registration of the deed, the terms of the requisition made by the solicitor for Wolf, the terms of the subsequent correspondence, and stating that she had been advised by the solicitors from the Beach O'Pines Protective Association that if the sale to Wolf was to be concluded they were instructed to commence proceedings at once to enforce the restriction set out

in clause (*f*). On May 8, 1948, on the joint application of the parties MacKay J. directed that a copy of the notice of motion to be served on the Beach O'Pines Protective Association and upon the Frank S. Salter Company Limited at least ten days before the hearing of the application. This Association is apparently an unincorporated body formed by some 35 persons owning and occupying property in the Beach O'Pines Development who had associated themselves together for the purpose of improving the property and of safeguarding the rights, privileges and quiet enjoyment of their members. Apparently on its behalf an affidavit of one of its members, James Burgess Book, was filed stating, *inter alia,* that the community had been developed as a summer recreational area, that the improvements made by the Association and the congeniality of its members had to a large extent improved the value of the lands, and that unless the restrictions and conditions concerning the lands were enforced it was his opinion and that of the Committee of the Association that the character of the community would be changed, with the result that the desirability of the locality as a summer residence for the present owners would be lessened and the value of the lands depreciated. On behalf of Wolf an affidavit of one of his solicitors was filed stating that he had searched the file of the Frank S. Salter Company Limited in the office of the Provincial Secretary at Toronto, that the last named address of Salter was in Detroit and producing what was stated to be a true copy of a statutory declaration made by Salter, said to be filed with the Provincial Secretary dated April 1, 1937, in which it was said, *inter alia,* that the company had held no meeting of directors or shareholders during the past four years and that "by reason that the company has not used its corporate powers for three and a half consecutive years such powers have become forfeited under section 28 of the Companies Act." This apparently was intended to be proof of the facts stated in the copy of the declaration. In addition, there was an affidavit showing that all of the conveyances of lands in the development made by the Salter Company contained the same restrictive covenants and conditions as those in the deed to Noble.

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When the matter came before Mr. Justice Schroeder he considered that a representation order should be made and directed that the interests of other land owners interested but not represented should be represented by six named persons, presumably land holders in the development. Both Noble and Wolf were represented by counsel on the argument. It is clear from the reasons for judgment delivered by Schroeder J. that the only questions argued were that the restrictive covenant was unenforceable as being contrary to public policy, as being void for uncertainty and on the further ground that it was an unlawful attempt to restrain the alienation of property conveyed in fee simple. These issues were those which had been considered and decided by MacKay J. in the *Drummond Wren* case (1) and these Schroeder J. decided adversely to the contention of the vendor. When the matter came before the Court of Appeal other counsel represented Wolf and a further question of law was raised which had not theretofore been argued or considered. Stated briefly the point is that the covenant contained in clause (*f*) is neither a covenant which would run with the land and therefore bind Wolf or subsequent owners, nor did it create a negative easement binding upon him or subsequent purchasers from him, whether with or without notice of its existence. The equitable principle, the extent of which is to be decided if the question is before us, is that stated by Lord Cottenham in *Tulk* v. *Moxhay* (2). This question is entirely distinct from the three issues which were submitted for the opinion of Schroeder J. and the Chief Justice of Ontario with whom Aylesworth J.A. agreed, and Hogg J.A. declined to consider it. Henderson and Hope JJ.A. gave written reasons but did not refer to the point, directing their attention to the matters that had been raised before Schroeder J.: I would, however, assume that they also considered the matter should not be dealt with. As the matter comes before us a majority of the court at least, if not all of its members, have declined to consider this point of law upon which the opinion of the learned judge in chambers has not been obtained.

(1) [1945] O.R. 778.

(2) 18 L.J. N.S. Ch. 83; (848) 2 Phil. 774.

Speaking generally, it has not been the practice of this court to interfere with the decisions of courts of appeal in matters of their own procedure. In *Toronto Railway* v. *Balfour* (3), the court refused to interfere with a decision of the Court of Appeal for Ontario in a matter of procedure, Taschereau J. saying that the matter was but a question of practice and consequently one with which, in accordance with the jurisprudence, the court would not interfere and referring to *O'Donnell* v. *Beatty* (1); *Williams* v. *Leonard and Sons* (2), and *Price* v. *Fraser* (3). In *Finnie* v. *City of Montreal* (4), Girouard J. pointed out that in matters of mere procedure when no injustice is shown the court will not interfere with the action of the court below. See also *Laing* v. *Toronto General Trusts* (5). Where, however, a grave injustice has been inflicted upon a party to a suit the court has interfered for the purpose of granting the appropriate relief, though the question may be one of procedure only as in *Lamb* v. *Armstrong* (6), and *Eastern Townships Bank* v. *Swan* (7). The question as to whether a court of appeal should hear questions of law not raised in the court below frequently is a difficult one to determine. Some of the objections to permitting the practice are pointed out in the judgment of Lord Finlay L.C. in *Banbury* v. *Bank of Montreal* (8), at 661-2. In *S.S. "Tordenskjold"* v. *S.S. "Euphemia"* (9) at 163, Duff J. as he then was said:

> The principle upon which a Court of Appeal ought to act when a view of the facts of a case is presented before it which has not been suggested before is stated by Lord Herschell in *The "Tasmania"*, (10) at p. 225, thus:
>
> > My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinized. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
> >
> > It appears to me that under these circumstances a court of appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention,

(3) (1902) 32 Can. S.C.R. 239 at 243.
(1) 19 Can. S.C.R. 356.
(2) 26 Can. S.C.R. 406.
(3) 31 Can. S.C.R. 505.
(4) 32 Can. S.C.R. 335.
(5) [1941] S.C.R. 32.
(6) 27 Can. S.C.R. 309.
(7) 29 Can. S.C.R. 193.
(8) [1918] A.C. 627.
(9) 41 Can. S.C.R. 154.
(10) 15 App. Cas. 223.

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as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box.

The settlement of the question involves the exercise of a discretion (*Banbury* v. *Bank of Montreal* (1),). It is, I think, of importance that when the matter was brought before the Court of Appeal, as noted in the judgment of the Chief Justice of Ontario, there was doubt as to whether the representation order made by Schroeder J. was authorized by the Rules of Court and that 37 additional interested parties were notified of the proceedings so that they might, if they wished, be heard. If under the practice the representation order was not properly made these persons were apparently not represented at the first hearing. Whether if the point now sought to be argued had been raised before Schroeder J. these persons or the six individuals who were then represented by Mr. Morden, K.C. would have considered that further evidence might be given which would affect the determination of the matter, I do not know and I must decline to speculate. The learned judges of the Court of Appeal for Ontario had exercised their discretion and declined to consider the matter and I think we should not interfere with their decision.

As to the remaining matters argued so fully before us, I agree with the learned Chief Justice of Ontario.

In my opinion this appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant (*Vendor*): *Carrothers, McMillan and Egener.*

Solicitors for the appellant (*Purchaser*): *Richmond and Richmond.*

Solicitors for the Respondents: *Day, Wilson, Kelly, Martin and Morden.*

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(1) [1918] A.C. 626.